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In the Supreme Court of the United States

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 510

DAVID FRIEDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1292–1293) is reported at 207 F. 2d 777.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1953 (R. 1292), and a petition for rehearing was denied November 30, 1953 (R. 1301). The petition for a writ of certiorari was filed December 28, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). See al o Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the evidence established the petitioner's net worth at the start of the taxable years in question sufficiently to present an issue for jury determination.

2. Whether the trial court committed reversible error in permitting the Special Agent to state his reasons for not including currency on hand in his computation of petitioner's net worth as of December 31, 1941.

3. Whether the trial court committed reversible error in a supplemental instruction to the jury.

STATUTE AND RULES INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years,

or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 30. *Instructions.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On December 15, 1950, an indictment in four counts was filed against petitioner in the United States District Court for the Southern District of Ohio, charging violations of Section 145 (b) of the Internal Revenue Code. The indictment al-

leged that petitioner wilfully attempted to evade and defeat income taxes due and owing by him for the years 1944, 1945, 1946 and 1947 by filing false and fraudulent income tax returns for those years disclosing a total income tax liability of $2,016.57, when in fact his correct income tax liability for those years was $39,291.74, and that the attempted evasion of tax amounted to $4,407.71 in 1944, $7,655.21 in 1945, $6,977.80 in 1946 and $18,234.45 in 1947. (R. 1-3.) After a jury trial, petitioner was found guilty on Counts Two, Three and Four, and not guilty on Count One, involving the year 1944. (R. 1146–1147.) On April 8, 1952, the District Court imposed concurrent sentences of imprisonment for eighteen months on each of the three counts and a fine of $10,000 on Count Two. (R. 1171.) The Court of Appeals affirmed. (R. 1292–1293.)

The Government's case was based upon the net worth method, and the principal question presented relates to the adequacy of the starting point evidence to show that the increases in petitioner's net worth during the years 1945, 1946 and 1947 could not have resulted from the investment of cash funds accumulated in earlier years. The Government's evidence may be summarized as follows:

In 1922, the petitioner and two other individuals formed a corporation known as the Buckeye Tailoring Company, which engaged in a tailoring business in Columbus until 1941, when it was

dissolved because it was unable to pay its bills. The general creditors received nothing and the petitioner bought the corporation's assets for $650. Thereafter, and through the years named in the indictment, the petitioner continued the business as a sole proprietorship, operating the wholesale business under the name of Buckeye Tailoring Company and the retail business under the name of American Mill Tailors. (R. 151–156, 174–184, 216–220, 727.)

Petitioner either filed no income tax returns or non-taxable returns for the years 1926 through 1930. For the years 1931 through 1941 he filed no income tax returns except for 1937, when a non-taxable return was filed. His 1942 return reported income of $2,400 and his 1943 return reported income of $2,587. (R. 1200–1204.) He filed no county personal property tax returns between 1938 and 1946, but on October 3, 1947, he filed delinquent returns for the years 1942 through 1947. (R. 1278–1279.) In 1931, he borrowed sums of $250 and $300 against a life insurance policy. (R. 1238–1239.) In December, 1934, a foreclosure action was filed against petitioner in connection with a real estate mortgage on which he had made no payments since May, 1932. After foreclosure was ordered, petitioner moved to postpone sale under an Ohio statute, and the Court entered an order under which the sale would be postponed for six months provided petitioner would pay the costs ($10.25), the current

taxes and the sum of $10 per month to the plaintiff. In March, 1935, petitioner stated through his counsel in open court that he would not be able to comply with those terms, and the court overruled his motion. (R. 1261–1277.) In February, 1936, a printing company sued petitioner for $13.76 and won a judgment. The writ of execution was returned "Nothing found to levy on". (R. 75–77, 1241.) In July, 1936, the Home Owners Loan Corporation filed foreclosure proceedings against petitioner and, when the property was sold in 1937, a deficiency judgment was entered against him. (R. 1242–1246.) On October 20, 1939, petitioner submitted to the National Life Insurance Company an application for a Federal Housing Administration loan of $7,600, together with a financial statement signed by him in which he detailed a total net worth of $8,700 including cash on hand of $150. The form contained a statement that the information furnished was "in all respects, true, correct and complete". (R. 1247–1248.)

The petitioner's income tax returns for the years 1944 through 1947 were prepared by a certified public accountant without audit from data furnished him by the petitioner. (R. 29–31.) Until November 30, 1944, the books were kept by an employee, but after that date they were kept by petitioner's wife. (R. 174–176, 585–595.) Special Agent Clager testified that throughout

1944 petitioner's books reflected gross receipts from alterations, but that after 1944 no such income was shown on the books; that petitioner explained that this type of income was used to repay loans which had been made to the business; that during the years 1945 through 1947 one hundred and fifty-three entries had been made on the cash receipts book crediting "Loan, D. Friedberg"; that petitioner explained that these entries represented funds taken from his safe deposit box and loaned to the business; but that investigation disclosed many instances where sales of merchandise had been credited to the loan account. (R. 307–327, 403–429.)

On October 10, 1947, shortly after the tax investigation by the Government agents began, petitioner accompanied them to a safe deposit box rented in February, 1945, in the name of David and Francis Handler (his wife's maiden name), in which was found $53,625 in bonds and $19,600 in currency. The currency was in fifteen envelopes or bundles, eleven of which bore dates and four bore no dates. The currency in the envelopes bearing no dates, totalling $5,600, was treated by the agents in their net worth computations as having been acquired in the year 1947. The remaining currency, $14,000, was considered to have been acquired on the dates shown on the envelopes and bundles. The bank's records showed that in each instance the box had been entered

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within a few days of those dates. Of the $53,625 in bonds, $53,425 had been purchased between 1943 and 1947. (R. 278–281, 358, 1207, 1256–1258.)

The petitioner's net worth, $11,768.88 at the end of 1941, had increased by the end of 1943 to $19,911.93. Between the end of 1943 and the end of 1947, it increased from $19,911.93, to $116,659.18, as compared with a total net income reported by petitioner during those four years of $16,915.31. (R. 335–357, 1187–1199, 1207–1208.) Special Agent Clager testified that he had compiled the net worth figures and that he had included all of the assets and liabilities which he was able to substantiate on the basis of his investigation, but that he had not included in his figures currency on hand as of December 31, 1941, because his "investigation disclosed no evidence which would permit" him to do so. The latter statement was made upon cross-examination while defense counsel was questioning him as to his failure to credit petitioner with cash on hand at the end of 1941. Later, on redirect examination, Clager testified that his investigation disclosed that petitioner had borrowed money in 1931 at 6 per cent interest and had not repaid it until 1935; that he had refinanced his home in 1933 through the Home Owners Loan Corporation, and later had settled a deficiency judgment of $3,000 secured by the Home Owners Loan Corporation for $100; that several other deficiency judgments had

been obtained against petitioner during the 1930's in connection with mortgage foreclosures; that in October, 1939, petitioner had filed a financial statement with a life insurance company in connection with a loan, in which he stated that he had cash on hand of $150; that he (Clager) had examined petitioner's sources of capital as shown by his records for the years 1941 and 1942 and found no indication of currency from undisclosed sources; and that on the basis of this investigation he could see no reason for including a substantial amount of cash on hand in his computation of petitioner's net worth as of December 31, 1941. (R. 336, 368-375, 443-446.)

The case went to the jury on the afternoon of January 10, 1952. After about four hours of deliberation, on January 10 and January 11 (R. 1144–1145), the court, in releasing the jury for lunch, stated (R. 1146):

> The Court will stand in recess until one-thirty. The Court may say to the jury at this time that I want you to make an honest and sincere effort to reach an agreement as to the merits of this case. I do not want you to shirk your duty. I want you to be fair to the Government, the United States, and the defendant. Nevertheless, this case has taken many days to try, and I hope you will make a sincere effort to compromise and adjust your differences and reach a verdict, if possible.

No objection was made to this supplemental instruction and at 3:15 p. m. the same day the jury returned its verdict. (R. 1146–1147.)

In arguing a motion for a new trial one week later, defense counsel stated (R. 1148–1149):

> Your Honor was, beyond any question of a doubt, extremely fair to the defendant and to the Government. The charge, which involved a very intricate phase of law which is most difficult to grasp and understand, was entirely fair in every respect, and I am quite conscious of the fact that I am stating this into a record which is a permanent record * * *.

In his argument (R. 1148–1161), defense counsel made no reference to the supplemental instruction now complained of. The trial court commented on this omission, read the instruction aloud and asked whether defense counsel claimed error. (R. 1161–1162.) The following exchange then took place (R. 1162–1163):

> The Court. Counsel have been very fair with the Court throughout the trial of this case, and I want to commend you for that. You have been a partisan, but the Court will take judicial notice of the fact that you have a right to be a partisan. You have been eminently fair in your presentation to the Court; however, the Court was more or less disturbed as to how much importance you were attaching to the sua sponte in-

struction of the Court at the time the jury went to lunch, as to whether or not you were seriously contending that the charge which the Court has just read to you, which was given at the luncheon period with the thought in mind that it might assist the jury in compromising and adjusting their differences and reaching a verdict, whether it be guilty or not guilty, was in error, whether or not you are insisting on that as a ground of error in this case.

Mr. SILLMAN. No, we are not.

The COURT. Then you are not insisting upon this special instruction which the Court has just called to your attention?

Mr. SILLMAN. I think it is correct. I think Your Honor gave it absolutely correct. I don't think we have at any place said it was incorrect.

The COURT. After quoting the Court's charge you say, "The jury apparently took literally the Court's suggestion and brought in this split verdict within a relatively short time after returning from lunch. Furthermore, in view of the nature of the evidence, the verdict of not guilty on count 1 has the effect of exonerating the defendant as to all counts of the indictment."

Of course, that goes on. I am interested alone in this instruction which the Court gave.

Mr. SILLMAN. I think your instruction was correct.

ARGUMENT

1. Petitioner contends (Pet. 9–13) that the Government failed to sustain its burden of establishing the net worth starting point and thereby failed to exclude the possibility that petitioner's net worth increases between 1944 and 1947 resulted from investment of cash funds accumulated prior to 1944. The contention is without merit.

The starting point evidence is set forth in the statement of facts and need not be repeated. The petitioner's income tax filing history, his borrowings, the mortgage foreclosures against him, and his own admissions *ante litem motam* show almost conclusively that he could not have had any substantial amount of cash on hand prior to 1944. See *United States* v. *Johnson*, 319 U. S. 503; *Gariepy* v. *United States*, 189 F. 2d 459 (C. A. 6th); *Schuermann* v. *United States*, 174 F. 2d 397 (C. A. 8th), certiorari denied, 338 U. S. 831. Petitioner's testimony at the trial was plainly in conflict with his previous statements and conduct, and hence a question of fact was raised. *Barcott* v. *United States*, 169 F. 2d 929 (C. A. 9th); *United States* v. *Chapman*, 168 F. 2d 997 (C. A. 7th), certiorari denied, 335 U. S. 853; *United States* v. *Skidmore*, 123 F. 2d 604 (C. A. 7th), certiorari denied, 315 U. S. 800.

Petitioner selects some of the Government's starting point evidence and attempts to explain it

away (Pet. 11–12), but it is apparent that his arguments go to the weight of the evidence, matters which the jury has already decided adversely to him. For example, he implies that the probative value of his signed financial statement (submitted October 20, 1939, in connection with an F. H. A. loan) is destroyed by his testimony at the trial that he was merely listing enough assets to obtain the loan (Pet. 12), despite the fact that in signing it he certified that it was "in all respects, true, correct, and complete." (R. 1247–1248.) Again, petitioner argues (Pet. 12) that on the writ of execution issued against him in 1936 the return "Notning found to levy on" is hearsay, when in fact the writ went into evidence without objection. (R. 75–77, 1241.)[1] If the jury had believed petitioner's testimony that he had accumulated a large amount of currency before 1944, it might have had a reasonable doubt as to his guilt, but that possibility is not the criterion by which this Court tests the validity of the verdict and the judgment. *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Curley* v. *United States*, 160 F. 2d 229, 237 (C. A. D. C.), certiorari denied, 331 U. S. 837.

Petitioner contends (Pet. 9) that there is a sharp conflict of opinion in the Courts of Appeals

[1] In any event the writ probably would have been admissible under 28 U. S. C., Sec. 1732. See *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 86 F. Supp. 255 (W. D. Penn.).

as to "the manner of establishing a starting point"[2] and cites *Demetree* v. *United States*, 207 F. 2d 892 (C. A. 5th). We assume that no one would disagree with the dictum in the *Demetree* case that the burden of proof should not be shifted to a defendant in a criminal case,[3] but we do not agree with petitioner that there is a conflict among the Courts of Appeals as to how far the Government must go to establish a solid net worth starting point. There is and can be no particular method which must invariably be used in building a satisfactory starting point. Admissions of a defendant in the form of financial statements prepared for credit purposes may suffice (*United States* v. *Potson*, 171 F. 2d 495 (C. A. 7th)); or general statements made by him regarding his financial condition (*United States* v. *Johnson, supra*); or his business records for pre-indictment years (*United States* v. *Chapman, supra*); or specific conduct prior to the prosecution period, incon-

[2] Petitioner argues that certiorari should be granted because this Court recently granted certiorari in the case of *Remmer* v. *United States*, No. 304, evidently on the assumption that this Court's action was based upon Remmer's contentions as to the net worth starting point evidence.

[3] Demetree's conviction was reversed because of certain improper comments by the trial court, and failure to give a requested instruction. The Court of Appeals stated, however, that it had examined the record with great care and had found the Government's net worth evidence sufficient to support the verdict.

sistent with his claim of affluence (*Barcott* v. *United States, supra*). In the instant case most, if not all, of these elements of proof are present.

The cases in which convictions were reversed on this point do not appear to be in conflict with those just cited or with the case at bar. In *Bryan* v. *United States,* 175 F. 2d 223 (C. A. 5), and *United States* v. *Fenwick,* 177 F. 2d 488 (C. A. 7), it was held that the Government failed to show that the starting point net worth included all of the assets owned by defendant at that time. These cases turned on their own peculiar facts and are not in conflict with those in other circuits. In more recent cases the Courts of Appeals for the Fifth and Seventh Circuits have found the Government's starting point evidence adequate. See *Pollock* v. *United States,* 202 F. 2d 281 (C. A. 5th), certiorari denied, 345 U. S. 993; *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 867 (C. A. 7th).

2. Petitioner contends (Pet. 14–15) that the trial court erred in permitting Special Agent Clager to state his reasons for not having included currency on hand in his computation of petitioner's net worth as of December 31, 1941. The contention has no merit.

Defense counsel opened the door to this testimony while cross-examining Clager regarding his failure to include currency. (R. 369.) Clager

freely admitted that if he had omitted any figures in the net worth statement the entire computation would be inaccurate. (R. 369.) When defense counsel sought to question him specifically as to the non-inclusion of currency in 1941, the court quite properly held that the witness could explain his answer (R. 369–371), whereupon Clager stated (R. 371):

> I did not include currency at the end of the year 1941 because my investigation disclosed no evidence which would permit me to put such a figure of currency in my schedule.

On redirect examination, Clager was permitted to review briefly his reasons for not listing currency as of December 31, 1941. This testimony (R. 443–445) is set forth in the statement of facts and need not be repeated.

Petitioner argues (Pet. 15) that this testimony was in the nature of an argument to the jury, and that it was grossly improper because it permitted the witness to invade the jury's province by stating his conclusion on "the ultimate question to be determined by the jury." We submit that the testimony was proper under the general principle that a witness is permitted to explain his answers. It was defense counsel who raised the question and who insisted upon an answer, although it was very clear from Clager's testimony

on direct examination that he had included no currency in 1941. (R. 338.) Surely the witness had a right, as the court held (R. 339), to "state the factual background upon which he arrived at his net worth conclusion." It would be a most unnatural thing if an expert accountant, upon being questioned about the accuracy of his figures, did not seek to explain why he believed them to be correct. In fact, defense counsel, in questioning Deputy Collector Nerny in the same vein, got the same sort of response (R. 470): "There is no evidence of any cash at the beginning, from our standpoint", although Nerny apparently had not heard Clager's testimony (R. 8). We submit that in asking these questions on cross-examination defense counsel necessarily assumed the risk that he might elicit testimony of this nature.

As for the contention that Clager was testifying on the ultimate question to be determined by the jury, this is plainly not correct. The question of whether there was substantial cash on hand at the end of 1941, or at any other time, concerned only one element of petitioner's net worth. The ultimate issue was whether all of the evidence proved beyond a reasonable doubt that petitioner had wilfully attempted to evade and defeat his income taxes.

3. Petitioner contends that the trial court committed reversible error in giving the jury a brief

supplemental instruction after it had deliberated for about four hours. (Pet. 16–18.) The instruction and pertinent later events are set forth in the statement of facts. (R. 1146–1163.) The contention is without merit.

Ordinarily, error in the court's charge may not be assigned on appeal unless timely objection was made at the trial. **Rule 30, Federal Rules of Criminal Procedure**; *Nemec* v. *United States*, 178 F. 2d 656 (C. A. 9th), certiorari denied, 339 U. S. 985; *United States* v. *Ward*, 168 F. 2d 226 (C. A. 3d). The purpose of this rule is to give the trial court an opportunity to make any corrections which it thinks are proper and thus minimize the possibility of error. *United States* v. *Furlong*, 194 F. 2d 1 (C. A. 7th), certiorari denied, 343 U. S. 950. But an appellate court will notice such an error *sua sponte* if it is so fundamental as not to submit to the jury the essential elements of the offense charged (*Screws* v. *United States*, 325 U. S. 91, 107), or if it appears that justice has gravely miscarried because of the giving of the charge (*United States* v. *Rappy*, 157 F. 2d 964 (C. A. 2d), certiorari denied, 329 U. S. 806).

In the case at bar, the supplemental instruction was entirely impartial, was expressly not objected to by defense counsel (*supra*, pp. 10–11), and contained no intimation of what the verdict

should be. No juror was asked to surrender his judgment, and the trial court was doing no more than expressing an earnest hope that they would attempt to reconcile their differences and agree upon a verdict if they could conscientiously do so. This case is plainly distinguishable from *United States* v. *Raub*, 177 F. 2d 312 (C. A. 7th), relied upon by petitioner, for in that case it was held (p. 316) that the instructions in question "amounted to the direction of the verdict, on the issue of falsity and fraudulence." In this case, the instruction was "entirely fair in every respect", as defense counsel himself stated (R. 1148–1149), and was consistent with instructions which have been widely approved by the courts. *Allen* v. *United States*, 164 U. S. 492, 501; *United States* v. *Allis*, 73 Fed. 165, 182–183 (C. C. E. D. Kans.), affirmed, 155 U. S. 117. See *Culp* v. *United States*, 131 F. 2d 93 (C. A. 8th); *Weathers* v. *United States*, 126 F. 2d 118 (C. A. 5th), certiorari denied, 316 U. S. 681; *United States* v. *McGuire*, 64 F. 2d 485 (C. A. 2d), certiorari denied, 290 U. S. 645.

The jury's verdict was not, as petitioner suggests, a compromise verdict. *Dunn* v. *United States*, 284 U. S. 390. In fact, the finding of not guilty on Count One and guilty on the remaining counts reflected careful consideration by

the jury of the evidence in the case.[4] See *United States* v. *Furlong, supra.*

CONCLUSION

The decision below is clearly correct, and presents no question calling for review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] The tax evasion alleged for 1944 was the smallest of the four years. There was testimony from petitioner's former bookkeeper that during her employment, which began in 1938 and terminated November 30, 1944, all of the income from the business was entered on the books. (R. 174, 193–196.) During the years 1945, 1946 and 1947, when petitioner's wife kept the books, gross receipts were sometimes credited to "Loans, D. Friedberg", but this practice was not followed in 1944. (R. 307–327, 585–595, 1024–1027.) It was not until February, 1945, that the petitioner rented a safe deposit box in the name of David Handler. (R. 279, 358, 1256–1258.)